

Telling the Good from the Bad

By Bryan A. Garner

Some writing is good; some is bad. It's pretty easy to evaluate. Below are eight passages. Four are good, and four are bad. You'll probably readily see which ones fall into each category. In some the meaning will be immediately clear to you; others will baffle you with their obscurity. Some will appeal to your ear; others you'll find repugnant. You be the judge. In the margin, mark the good ones with a G, the bad ones with a B:

1. A signature on a pleading constitutes a certificate by the signator that the instrument is not groundless or brought in bad faith or for the purpose of harassment, except that a signature on a general denial will not provide a basis for a violation on these grounds.
2. This case squarely presents questions of exceptional importance. The Eighth Circuit's opinion retroactively imposes an unconstitutional punishment without the kind of fair notice mandated by the Due Process Clause. While purporting to uphold an arbitration agreement that expressly precluded punitive damages, the Eighth Circuit reinstated an award of punitive damages 3,000 times greater than Stark's actual damages. This holding contravenes three important federal policies, each of which would independently warrant this Court's protection. First,
3. In the case of a consignment that is not a security interest when the filing and notification requirements have not been met, the interests of a person delivering goods to another is subordinate to a person who would have a perfected security interest in the goods if they were the property of the debtor.
4. Nevertheless, the fact that the Named Plaintiffs likely cannot also be members of the Repair Fee Subclass or the Recent Purchaser Subclass does not mean that their claims are not typical of the claims of the members of these proposed subclasses.
5. Constitutional guarantees have real meaning to those accused of crime: the shields raised by the Constitution do not dissolve upon the utterance of ritualistic words, and its promises mean what their plain language conveys.
6. Here we have more than the inconceivably slow unfolding of a "conspiracy." These two years saw a continuing struggle for customers between Interborough and the 13 new wholesalers. At times Interborough gained; at others it lost. During the last year, the struggle was intensive enough for Meyer to characterize it as a "dogfight." That someone may lose this sort of struggle is perhaps a regrettable feature of the free-enterprise economy. But the word for what happened is not "conspiracy." It is "competition."
7. The question whether a product accused of infringement is an "equivalent" of the claimed invention is an issue of fact, and this Court gave specific guidance to the Federal Circuit on how to review such a factual determination. But the Federal Circuit balked, threw up its hands, and instead, in Judge Michel's words, "by-passed the all-elements rule altogether." This is profoundly wrong in law, in logic, and in policy.
8. Of even greater significance, would be the plaintiff who claims he has lung cancer and is a member of a trial group that is comprised of himself and four other plaintiffs complaining of pleural plaques compared to another plaintiff who also complains of lung cancer but is joined in a trial group of himself and four other plaintiffs complaining of mesothelioma.

In my experience, most law students and lawyers have little trouble distinguishing the good prose from the bad. But they have a hard time providing concrete reasons for their preferences—apart from using adjectives such as *unclear*, *confusing*, and *incoherent*, or *clear*, *straightforward*, and *interesting*. One major purpose of writing instruction is to enhance your ability to analyze the stylistic qualities that make some writing good and other writing bad.

Of course, no writer produces bad work on purpose. The writer just doesn't know how to do better. Offering advice and suggestions—such as eliminating redundancy, replacing fancy expressions with simple ones, and introducing signposts—makes little if any impression if the writer can't recognize redundancy, see opportunities to simplify, or see the need for signposts. All these things require judgment.

And while rules can be taught, judgment is a trickier matter: judgment is a matter of *when* to apply the rules. That's not something that you can memorize. Judgment isn't so much something that you can be taught as it is something that you can develop, perhaps by yourself and perhaps with the help of training.



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If you want to improve your style, you must develop stylistic judgment. You must learn to distinguish good writing from bad. (Accept that in law, you'll see much more bad writing than good.) You must become sensitized to bad writing. And you must keep this critical sense active in all your reading, whether it's a newspaper, a law journal, a biography, a novel, or a treatise on eminent domain.

Again and again, whatever the genre, you'll see that good writing is easy to read, while bad writing is hard to read. If you can't understand something you're reading, you shouldn't assume that you're dull-witted or that the subject is simply over your head. Instead, you can safely assume that the writer isn't or wasn't much of a writer. A good writer who knows a subject well can make almost any point seem readily intelligible, even with an arcane topic.

There are only two things lawyers get paid for: writing persuasively and speaking persuasively. It's not as if those are two im-

portant things among many. They are the *only* two things. That's it. And your writing comes first. When you improve your writing, your speaking will automatically become better. The contrary isn't necessarily true at all.

Now let's return briefly to those eight passages. Of the four good passages, one was written by Theodore B. Olson of Washington, D.C. (#2); two by Jay Topkis of New York City (#5, #6); and one by Robert H. Bork of Washington, D.C. (#7). What these writers have in common is a knack for clear, bright exposition and argument. In that, of course, they stand well above the crowd.

And what exactly is the crowd like? Having spent over two decades closely studying legal writing, particularly that of practicing lawyers, I'd say that 80 percent of lawyers have a style akin to that of the four bad passages. (Most in that number actually believe that they're good writers.) Perhaps only 2 percent can produce prose similar to that of the four good passages. And perhaps 18 percent are somewhere in between.

The habit of writing clearly and persuasively isn't one you're born with. Almost anyone can cultivate it to a significant degree. It's true that not everyone can become a masterly stylist. Not everyone has the patience and fortitude to develop the necessary knowledge and skill. But almost everyone can become competent, most can become better than competent, and a few will become true experts.

A big part of competence is attitude. To do a job well, you must take pride in what you're doing. If you believe that, then you'll probably come to believe in the importance of doing things better than they've customarily been done. ■

Reprinted from Bryan A. Garner's ABA column in The Student Lawyer.

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Last Month's Contest

Last month, I invited you to revise current Federal Rule of Evidence 609(d) on juvenile adjudications. I suggested that you try using a vertical list. Here's the current rule:

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

The winner is Nathan Miller, an associate with Dingeman, Dancer & Christopherson in Traverse City. His revision (with one edit):

Evidence of a juvenile adjudication is admissible only if:

- (1) it is offered in a criminal case;
- (2) it is offered to impeach a witness other than the accused;
- (3) conviction of the offense would be admissible to impeach an adult's credibility; and
- (4) it is necessary to fairly determine the accused's guilt or innocence.

Compare that version with the restyled version, in which I've proposed one further improvement (in brackets):

(d) Juvenile Adjudications. Evidence of a juvenile adjudication is admissible under this rule only if:

- (1) it is offered in a criminal case;
- (2) the adjudication was of a witness other than the defendant;
- (3) a conviction of an adult [an adult's conviction] for that offense would be admissible to attack the adult's credibility; and
- (4) admitting the evidence is necessary to fairly determine guilt or innocence.

The mighty vertical list. Few devices are so useful to the drafter—or helpful to the reader.

—JK

A New Contest

Although I've finished the four-part series on the restyled evidence rules, let's stay with the evidence rules for our contest. I'll send a copy of *Lifting the Fog of Legalese: Essays on Plain Language* to the first person who sends me (kimblej@cooley.edu) an "A" revision of current Rule 613(a). The deadline is December 21. In the past, I've responded briefly to most entries, but as they increase, I probably can't continue to do that. I do read them all and thank everyone for participating. So here's 613(a):

(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

Some hints. Try for a more informative heading. Change *concerning*. Change *by the witness* to a possessive. Convert to the active voice by naming a new subject. Convert to two sentences, starting the new one with *But*. Replace *the same* (ugh). And replace *shall*.